

NO. 43449-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

ROBERT WAYNE RICE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-00031-0

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERRORS

- I. THE STATE CONCEDES THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR FELONY HARASSMENT-DEATH THREATS
- II. RICE WAS PROPERLY CONVICTED OF VIOLATING THE CIVIL ANTIHARASSMENT ORDER AND THE JURY INSTRUCTIONS PROPERLY REQUIRED THE JURY FIND ALL ESSENTIAL ELEMENTS OF THE CRIME WERE PROVEN BEYOND A REASONABLE DOUBT
- III. THE TRIAL COURT PROPERLY SENTENCED RICE TO CONSECUTIVE TERMS OF PROBATION FOR HIS TWO MISDEMEANOR CONVICTIONS.

B. STATEMENT OF THE CASE

Jody Beach is a custody officer at the Clark County Jail. 2A RP at 210. Ms. Beach became familiar with Robert Rice through her job when he was an inmate at the jail. 2A RP at 215. On March 16, 2011, Rice was brought in uncooperative, yelling and screaming. 2A RP at 215. Rice's file with the jail showed he was a higher threat and required two officers to transport him. 2A RP at 217-18. On this occasion, Rice told Ms. Beach that he was going to "shoot [her] between the eyes." 2A RP at 218.

Rice was again an inmate at the Clark County Jail from October 24, 2011 until November 22, 2011. 2A RP at 221. On December 9, 2011, Ms. Beach became aware of a personal note that Rice wrote to her on a

business card for the Econo Lodge and flowers that he left for her. 2A RP at 221-22; 274. On another occasion Rice came to the jail and asked Ms. Beach out to breakfast. 2A RP at 229.

Jonathon Swiger, Emily Cain, Stephen Hunter and Lorie Stewart are all employed by the Clark County Sheriff's Office and work in the reception area of the jail. 2B RP at 341; 2B RP at 349; 2B RP at 363; 3A RP at 383. On December 9, Mr. Swiger was working as a cadet at the reception area of the jail when Rice came in and asked about flowers he had dropped off the day before. 2B RP at at 342-43. Mr. Swiger remembered Rice writing a note and saying "...how he wanted to tell her that he wanted to let her know how he was doing and where he was going and to contact him." 2B RP at at 343. Ms. Cain recalled Rice coming in and asking if Ms. Beach was available to receive flowers. 2B RP at at 352. Mr. Hunter observed Rice at the jail lobby making conversation with the workers, the visitors, and leaving flowers and a note for Ms. Beach. 2B RP at 365. Mr. Hunter saw the note and the note told Ms. Beach that Rice had recently gotten out of the hospital and that he needed her phone number. 2B RP at 367. Rice signed the note, "I love you." 2B RP at 367. Ms. Stewart observed Rice bring a bouquet of flowers to the jail lobby and asked if Jody Beach was on duty. 3A RP at 386. When Rice was told Ms. Beach was not on duty he left. 3A RP at 387. Rice returned the next day

and asked for Jody Beach again. 3A RP at 387. The second time, Rice left a bouquet of flowers for Ms. Beach. 3A RP at 388. Rice mentioned that he and Ms. Beach were going to go on a breakfast date. 3A RP at 388. On another occasion Ms. Stewart observed Rice wait in the lobby of the jail for a period of time. 3A RP at 389.

Sergeant Randal Tangen works for the Clark County Sheriff's Office as a jail sergeant. 2B RP at 336. Sergeant Tangen came to work one day and observed a vase with flowers and a note addressed to Ms. Beach on a desk. 2B RP at at 337. The note was signed "Bob Rice." 2B RP at at 337.

Deputy Marc Butterfield of the Clark County Sheriff's Office investigated the issue of Rice's unwanted contact with Ms. Beach in December 2011. 2B RP at 329. Deputy Butterfield seized evidence including a black, plastic vase that had flowers in it and a card. 2B RP at at 332.

Deputy Jason Hafer is employed with the Clark County Sheriff's Office. 3A RP at 393-94. On December 16, 2011 Deputy Hafer spoke with Rice about Jody Beach. 3A RP at 395. Deputy Hafer informed Rice that he was not welcome to contact Jody Beach, that she did not want his flowers or him to contact her or have breakfast with him. 3A RP at 398. Deputy Hafer advised Rice of the risk of being charged with harassment or

stalking. 3A RP at 398. Rice's demeanor changed from jovial to very upset during this conversation. 3A RP at 399. Deputy Bain entered the room and also told Rice he could no longer contact Ms. Beach. 3A RP at 402-04. Deputy Scott Bain is a Deputy Sheriff with the Clark County Sheriff's Office. 2A RP at 292. Rice directed his anger towards Deputy Bain. 2A RP at 297. Rice's face appeared angry; he told Deputy Bain he was going to kill him. 2A RP at 297. Rice became very angry and braced himself on the table and started to make violent and aggressive statements towards Deputy Bain. 3A RP at 404. Rice told Deputy Bain, "I'm going to break your fucking neck," "you're going to die, I'm going to kill you," and "I'm going to drop you, I'm going to bust your neck." 3A RP at 404. Rice also told Deputy Bain that he was a Green Beret and had the skills to kill him. 3A RP at 404. Deputy Bain placed him under arrest for felony harassment. 3A RP at 405. Deputies Bain and Hafer took Rice into custody and placed him in handcuffs. 3A RP at 405.

As Rice was making repeated death threats, Deputy Bain stepped back and unsnapped his Taser because Rice was causing him fear of an assault. 2A RP at 298. After numerous death threats, Deputy Bain placed Rice under arrest for felony harassment. When asked to describe the basis for his fear, Deputy Bain stated that, "a very angry individual seated at the table, screaming and yelling that he's going to kill me. I don't know him,

sometimes I guess I—I don't know—I don't know if somebody that has a very—somebody who's that angry and upset with me, telling me they're going to kill me, causes me concern." 2A RP at 299. Deputy Bain called a third deputy into the room so that he felt safer and then placed Rice into handcuffs. 2A RP at 300-01. After being arrested, Rice told Deputy Bain that "I'm a Green Beret and I will rip your fucking head off." 2A RP at 302. Rice also told Deputy Bain that "This is not a threat, it's a promise." 2A RP at 302. When asked if he feared that Rice was going to kill him on that day, Deputy Bain responded, "He—he was in a different position that day. He was not quiet, content, sitting peacefully. He was extremely angry, livid. A—a wild look to him. His—his eyes—he was extremely aggressive." 2A RP at 311-12.

Ms. Beach petitioned the court for an order of protection against Rice. 2A RP at 226-27. Deputy Bain served on Rice, by reading to him, his copy of the petition and temporary order for protection that Ms. Beach applied for in December 2011. 2A RP at 303. On December 28, 2011 she was present in court at a hearing on her request for a protection order. 2A RP at 229. Rice was aggressive and hostile towards Ms. Beach during the hearing. 2A RP at 230. As a result, Ms. Beach was more fearful for her safety. 2A RP at 232. The court issued the protection order. 2A RP at 269. Ms. Beach began carrying a concealed weapon in response to Rice's

behavior towards her. 3A RP at 435-36. Ms. Beach also asked co-workers to walk her out to her car after her shifts at work. 3A RP at 436.

Deputy Jason Granneman of the Clark County Sheriff's Office interviewed Rice on December 29, 2011. Rice told Deputy Granneman that he knew Ms. Beach well, that she had asked him to marry her. 3A RP at 423. Rice admitted to bringing flowers to Ms. Beach at the jail. 3A RP at 425. Rice indicated that he loved Ms. Beach and that she was contacting him by sending him love notes while he was in the jail. 3A RP at 429. Rice also indicated he had a sexual relationship with Ms. Beach. 3A RP at 429.

Deputy Richard Guardan is a Deputy Sheriff with the Clark County Sheriff's Office. 2A RP at 313. On January 23, 2012 Deputy Guadan was approached by a jail custody sergeant with a letter from Rice written to Jody Beach. 2A RP at 314. Once Deputy Guadan realized the letter from Rice was written to Ms. Beach, he confirmed with jail records that a protection order was in effect. 2A RP at 318. Deputy Guadan spoke with Rice who admitted to writing Ms. Beach the letter. 2A RP at 321.

Rice was charged by a Third Amended Information with Felony Stalking, Misdemeanor Stalking, Felony Harassment-Death Threats, and Violation of a Civil Antiharassment Protection Order. CP 3-4. A jury convicted Rice of Misdemeanor Stalking, Felony Harassment-Death

Threats and Violation of a Civil Antiharassment Protection Order. CP 29-

31. The trial court gave the following instruction to the jury:

To convict the defendant of the crime of violation of a court order, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That between January 20, 2012 and January 23, 2012, there existed a protection order applicable to the defendant;
- (2) That the defendant knew of the existence of this order;
- (3) That on or about said date, the defendant knowingly violated a restraint provision of the order prohibiting acts or restraint provision of the order prohibiting contact with a protected party; and
- (4) That the defendant's act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 26. Defense did not object to this instruction. 3A RP at 481-82. The

court sentenced Rice to a standard range sentence on the Felony

Harassment conviction and sentenced each misdemeanor consecutive to

the other for a total sentence that included 48 months of probation. CP 34,

44.

C. ARGUMENT

I. THE STATE CONCEDES THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR FELONY HARASSMENT- DEATH THREATS

Rice argues there was insufficient evidence to support his conviction for felony harassment. The State agrees and concedes there was insufficient evidence to support the conviction, and the conviction for felony harassment should be reversed and dismissed.

When an appellant alleges there was insufficient evidence to convict him of a crime, the reviewing court views the evidence admitted at trial in the light most favorable to the State to determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A claim of insufficiency “admits the truth of the State’s evidence and all inferences that can” be reasonably drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003), the Supreme Court held that in order to convict a defendant for felony harassment based on a threat to kill, the State must prove that the victim was placed in fear that the threat to kill would be carried out. *C.G.*, 150 Wn.2d at 612.

In *C.G.*, *supra*, the victim testified that C.G.’s threat that she would kill him caused him concern. *Id.* at 607. The victim, her high school vice

principal, also testified that he believed C.G. might try to harm him or someone else in the future. *Id.* The victim did not testify that he believed C.G. would carry out her threat to kill him. *Id.* The Supreme Court reversed C.G.'s conviction for felony harassment against her vice principal because there was no evidence that the victim subjectively and reasonably believed C.G. would carry out the threat to kill him. *Id.* The facts in *C.G.* are very similar to the facts in Rice's case.

At Rice's trial, the victim of the felony harassment conviction, Deputy Bain, testified that he feared assault based on Rice's repeated threats to kill him. 2A RP at 299. Though there is ample evidence in the record that Deputy Bain's fear of Rice carrying out his threat to kill would be reasonable, there is no evidence in the record that Deputy Bain feared the specific threat Rice made, a threat to kill, would be carried out. Though asked directly if he believed Rice would kill him that day, Deputy Bain did not address whether he subjectively feared Rice would carry out his threat to kill. 2A RP at 312. As there was no evidence presented from which a rational trier of fact could conclude that Deputy Bain himself feared Rice's actual threat to kill would be carried out, there is insufficient evidence to support the conviction for felony harassment. The State concedes that due to insufficiency of the evidence to support the

conviction for felony harassment, this conviction should be reversed and dismissed.

II. THE JURY INSTRUCTIONS PROPERLY
INSTRUCTED THE JURY ON THE LEGAL
REQUIREMENTS TO CONVICT RICE OF VIOLATION
OF A CIVIL ANTIHARASSMENT ORDER

Rice alleges the court improperly instructed the jury on its obligation to find all the essential elements of the crime of violation of the civil antiharassment protection order were satisfied beyond a reasonable doubt. Rice did not object to the to convict instruction on the violation of the order at the trial level. 3A RP at 481-82. RAP 2.5 precludes Rice from raising this issue for the first time on appeal unless the failure to give the instruction is a manifest error of constitutional magnitude. *State v. McCullum*, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983). CrR 6.15(c) requires that objections to instructions be made prior to the court instructing the jury so that the trial court “may have the opportunity to correct any error.” *Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976). The constitutional error exception to RAP 2.5(a)(3) is a narrow exception, and affords review only for certain constitutional questions. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). A reviewing court should first satisfy itself that the alleged error is truly of constitutional magnitude and then if it is, should examine the effect the

error had on the defendant's trial according to the harmless error standard set forth in *Chapman v. California*, 386 U.S. 18, 17 L. Ed.2d 705, 87 S. Ct. 824 (1967). *State v. Scott*, 110 Wn.2d at 689.

The first question is whether the instruction on violation of the civil antiharassment protection order constitutes constitutional error. Though the State contends there was no error, Rice alleges the instruction did not set forth all the elements of the crime. Omitting an element of the crime charged is a manifest constitutional error that may be reviewed for the first time on appeal. *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), *overruled on other grounds in State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985). Therefore, Rice alleges a manifest constitutional error which may be reviewed for the first time on appeal. However, Rice cannot satisfy the second test as set forth in *Scott, supra* because any error was harmless beyond a reasonable doubt.

The State has the burden of proving all essential elements of the charged offense beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). As the State must prove every essential element beyond a reasonable doubt, it is reversible error to instruct the jury in a manner that relieves the State of this burden. *State v. Byrd*, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995). The mens rea element of a crime is an essential element of the crime. The

elements instructions to the jury serve as the “yardstick” by which the jury measures the evidence to determine guilt so it must contain all the essential elements. *State v. Smith*, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997); *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). Rice argues that he was convicted of a crime he was not charged with because the to convict instruction used the term “knowingly” instead of “willfully.” This claim fails.

The requirements of due process are usually met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted. *Scott*, 110 at 690 (citing *State v. Johnson*, 100 jWn.2d 607, 623, 674 P.2d 145 (1983) and *State v. McHenry*, 88 Wn.2d 211, 558 P.2d 188 (1977)). Though the charging language of the Third Amended Information alleges that Rice willfully disobeyed the order while it was in effect, RCW 9A.08.010(4) provides that when a person acts knowingly with respect to the material elements of the offense, then the requirement of willfulness is satisfied by acting knowingly. RCW 9A.08.010(4).

With respect to violations of no contact orders, a defendant acts willfully if he acts knowingly with respect to the material elements, including the contact element. *State v. Sisemore*, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002). In *Sisemore*, this Court found that a defendant who

knowingly acted to contact the protected party of a protection order acts willfully in making the contact. *Id.* at 78.

Though *Sisemore, supra*, specifically analyzes the mens rea requirements under violations of protection orders charged pursuant to RCW 10.99.050, the reasoning is applicable in Rice's situation. RCW 10.99.050 states that a "willful violation of a court order issued under this section is punishable under RCW 26.50.110." Rice was charged under RCW 10.14.170 which states "any respondent age eighteen years or over who willfully disobeys any civil antiharassment protection order issued pursuant to this chapter shall be guilty of a gross misdemeanor." RCW 10.14.170. Both statutes use the term "willful" to describe the level of violation that is prohibited.

Further, RCW 9A.08.010(4) specifically states that the mens rea of willfully is established by a finding of knowingly. This statute equates knowingly and willfully. *Bishop v. City of Spokane*, 142 Wn. App. 165, 171, 173 P.3d 318 (2007); *State v. Ware*, 111 Wn. App. 738, 743, 46 P.3d 280 (2002). A statute's requirement that a crime be committed willfully is therefore satisfied if it is proved that the crime was committed knowingly. *Ware*, 111 Wn. App. At 743.

As willful and knowingly are equivalent, it was not error for the court to instruct the jury as it did in the to-convict instruction for the

violation of the civil antiharassment order. Rice argues that the instruction given to the jury relieved the State of its burden of proving each of the elements beyond a reasonable doubt. However, the to-convict instruction given accurately and appropriately required the jury to be satisfied of all elements of the crime beyond a reasonable doubt.

The court instructed the jury that:

To convict the defendant of the crime of violation of a court order, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (5) That between January 20, 2012 and January 23, 2012, there existed a protection order applicable to the defendant;
- (6) That the defendant knew of the existence of this order;
- (7) That on or about said date, the defendant knowingly violated a restraint provision of the order prohibiting acts or restraint provision of the order prohibiting contact with a protected party; and
- (8) That the defendant's act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 26. Rice was charged under RCW 10.14.120 and RCW 10.14.170

which prohibit any willful disobedience of the protection order. There is no element of RCW 10.14.120 and 10.14.170 that is excluded from the to-convict instruction the court gave in Rice's trial. All the essential

elements of the crime were included in the to convict instruction, namely that the defendant know of the existence of an order, and that he knowingly violated that order.

The evidence at trial supported that this was a knowing, willful violation of a protection order that Rice knew existed. Any possible error in giving this instruction was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 17 L. Ed.2d 705, 87 S. Ct. 824 (1967). The evidence at trial showed Rice was present in court when the Commissioner issued the antiharassment protection order and that on an occasion after that hearing, he wrote a letter to the protected party and sent it to her. 2A RP at 314. The letter was intercepted by jail custody officers and given to a deputy sheriff. 2A RP at 314. The defendant admitted to police that he wrote the protected party the letter. 2A RP at 321. The overwhelming evidence at trial shows Rice knowingly and willfully violated the civil antiharassment order. The jury instruction properly instructed the jury and did not relieve the State of its burden of proving all the essential elements of the crime. Any possible error in giving the instruction was clearly harmless beyond a reasonable doubt. *See Scott, supra*. Rice's conviction for violating the civil antiharassment order should be affirmed

III. THE TRIAL COURT PROPERLY SENTENCED RICE TO CONSECUTIVE TERMS OF PROBATION FOR THE TWO MISDEMEANOR CONVICTIONS.

Rice argues it was error for the trial court to sentence him to consecutive terms of probation on his two misdemeanor convictions. Rice's argument, and the holding in *State v. Parent*, 164 Wn. App. 210, 267 P.3d 358 (2011), is inconsistent with the plain language of the statute and the broad discretion conferred on trial courts to sentence misdemeanors. Trial courts have broad discretion to impose misdemeanor and gross misdemeanor sentences within statutory limits. *State v. Anderson*, 151 Wn. App. 396, 402, 212 P.3d 591 (2009). The court may suspend or defer misdemeanor sentences, impose consecutive sentences, and even exceed the standard range sentence for a comparable felony. *Id.* There is no legislation limiting the trial court's discretion to sentence misdemeanors comparable to the strict limitations for the Sentencing Reform Act (SRA) as to felonies. *Id.*

RCW 9.95.210 provides in relevant part:

In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.

RCW 9A.02.020. The trial court sentenced Rice to two years of probation on the misdemeanors, as contemplated by the statute, and ran them consecutively for a total of 48 months on probation.

The purpose of statutory interpretation is to “determine and give effect to the intent of the legislature.” *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *In re Pers. Restraint of Williams*, 121 Wn.2d 655, 663, 853 P.2d 444 (1993). If more than one interpretation of the plain language of a statute is reasonable, the statute is ambiguous and then the court turns to statutory construction. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009); *State v. Jacobs*, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005).

Issues of statutory construction are reviewed de novo. *Welch v. Southland Corp.*, 134 Wn.2d 629, 632, 952 P.2d 162 (1998). On appeal, courts assume that “the legislature meant exactly what it said” and “give the plain language of a statute its full effect.” *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993). Courts only avoid a literal reading of the statute if it results in unlikely, absurd, or strained results. *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999).

“Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is

found, related provisions, and the statutory scheme as a whole."

Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

Statutes are interpreted and construed "so that all the language used is given effect, with no portion rendered meaningless or superfluous."

Whatcom County v. Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Undefined statutory terms are afforded their usual and ordinary meaning. *Christensen*, 162 Wn.2d at 373.

A statute is ambiguous when it is susceptible to more than one reasonable interpretation. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d (2001). When construing an ambiguous statute, courts rely on statutory construction, legislative history, and relevant case law to determine legislative intent. *Id.* An unambiguous statute, however, does not require construction and courts may not consider non-textual considerations such as the rule of lenity¹ when applying a statute's plain language. *State v. Bolar*, 129 Wn.2d 361, 366, 917 P.2d 125 (1996).

As we must assume the legislature "meant exactly what it said" in RCW 9.95.210(1), using the plain language analysis, "maximum term of sentence" refers to the statutory maximum amount of time faced by a defendant on each individual count. By its plain words, the statute

¹ If indications of legislative intent are "insufficient to clarify the ambiguity," then the court interprets the statute in favor of the defendant. *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 250 & n.4, 252-53, 955 P.2d 798 (1998).

indicates that the court may impose probation when “the sentence” is suspended and limit the probation term to the longer of two years or “the maximum term of sentence.” RCW 9.95.210(1). Both references to “sentence” are in the singular and are preceded by the word “the,” suggesting that the legislature was referring to one specific, discrete crime. *See State v. Mortell*, 118 Wn. App. 846, 850, 78 P.3d 197 (2003) (reasoning that the legislature’s use of the word “a” before “gross misdemeanor” denoted one specific, discrete crime).

The statute does not contain any language that leaves room for the argument that the “maximum term sentence” is the total amount of time facing a defendant on all counts. The statute does not contain the words, “total,” “aggregate,” “combined,” or “sum,” nor does it reference situations involving multiple counts or cause numbers. When the legislature has intended that courts consider multiple counts together it has specifically provided for such situations. *E.g.*, RCW 9.94A.589(1)(a) (“whenever a person is to be sentenced for two or more current offenses”); RCW 9.92.080(3) (“whenever a person is convicted for two or more offenses”).

Division 1 has ruled on this same issue now before this Court in *State v. Parent, supra*. The Court in *Parent, supra*, found that the defendant’s interpretation of the statute was equally as possible as the

State's interpretation. *Parent*, 164 Wn. App. at 213. However, to come to that conclusion, the Court in *Parent*, read missing language into the statute and concluded that a possible interpretation of "maximum term of sentence" means the combined maximum sentence on all counts, despite the absence of such language and the statute's plain meaning. The Court in *Parent, supra* found this statute was ambiguous. *Id.* at 213. This statute, upon a plain reading, is not ambiguous and this court should not find it is.

Examining the context of RCW 9.95.210(1) and related statutes confirms that the plain meaning of "maximum term of sentence" is the maximum sentence for each count. The subsection immediately following RCW 9.95.210(1) provides in relevant part:

In the order granting probation and as a condition thereof, the superior court may in its discretion imprison the defendant in the county jail for a period not exceeding one year and may fine the defendant any sum not exceeding the statutory limit for the offense committed, and court costs.

RCW 9.95.210(2). Subsection (2)'s limited focus on the "the offense committed" suggests that subsection (1) is similarly focused on the statutory maximum for each count, rather than the maximum on all counts combined.

Related statutes in the same chapter further indicate that the plain meaning of “maximum term of sentence” is the maximum sentence on each crime. RCW 9.95.010, although applicable only to pre-SRA felonies, specifically defines “maximum term” as “the maximum provided by law for the crime of which such person was convicted.” Similarly, RCW 9.95.100 mandates that defendants convicted of felonies prior to the SRA’s inception must be discharged from custody after “serving the maximum punishment provided by law for the offense.”

The legislature's consistent linking of "maximum term" and "maximum punishment" with a singular "crime" or "offense" suggests that the legislature intended that "maximum term of sentence" refer to the maximum sentence on each count, rather than the maximum sentence on all counts combined. Reading the statutes together in harmony and consistent with RCW 9.95.210(2), RCW 9.95.010, and RCW 9.95.100, the plain meaning of "maximum term of sentence" is the maximum sentence on each count. *See State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282, *cert. denied*, 531 U.S. 984 (2000) (stating related statutory provisions must be read together and harmonized in order to achieve a unified statutory scheme).

Further, an interpretation of "maximum term of sentence" as the aggregate maximum sentence on all counts combined would lead to

absurd results. *See Davis*, 137 Wn.2d at 963 (stating courts should avoid reading a statute in a way that leads to absurd results). By Rice's and the Court in *Parent's* interpretation, a defendant could be sentenced on a misdemeanor in superior court one day, receive the maximum two years of probation, and then the next day receive the same sentence on a misdemeanor under a different cause number, resulting in 48 months total probation.

Yet, if this defendant was sentenced on the same day on two misdemeanor counts joined under the same cause number, then the defendant could only receive 24 months of probation. The legislature could not have intended for such absurd and disproportionate results, particularly given the legislature's previously demonstrated intent that superior courts and courts of limited jurisdiction have equal probation authority over misdemeanors. Final Legis. Rep., HB 1166, at 68-69 (Wash. 1984) (stating the 1984 amendment "has the effect of putting superior and district courts on an equal basis" and resolves the "serious 'equal protection' problem").

Based on a plain reading of "maximum term of sentence," the surrounding context in which it appears, and related statutory provisions, the Court should find that "maximum term of sentence" is unambiguous and means the maximum sentence on each count. The Court should reject

the Court's holding in *Parent, supra* and its efforts to insert language that does not exist in RCW 9.95.210(1) and which leads to absurd results.

D. CONCLUSION

The State concedes there was insufficient evidence to support Rice's conviction for felony Harassment and that charge should be dismissed. As to Rice's conviction for violation of a civil antiharassment protection order, the jury instructions properly instructed the jury on the elements and any error was harmless beyond a reasonable doubt. The trial court was within its discretion and authority to sentence Rice's two misdemeanor convictions consecutively. Aside from the Harassment conviction, the trial court should be affirmed in all respects.

DATED this 17th day of April, 2013.

Respectfully submitted:

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